

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

Case No. 13-CV-03122 (VEB)

SUSAN JANE CATRON,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In May of 2011, Plaintiff Susan Jane Catron applied for Disability Insurance Benefits (“DIB”) under the Social Security Act. The Commissioner of Social Security denied the application.

1 Plaintiff, represented by Cory J. Brandt, Esq., commenced this action seeking
2 judicial review of the Commissioner's denial of benefits pursuant to 42 U.S.C. §§
3 405 (g) and 1383 (c)(3). The parties consented to the jurisdiction of a United States
4 Magistrate Judge. (Docket No. 5).

5 On June 30, 2014, the Honorable Rosanna Malouf Peterson, Chief United
6 States District Judge, referred this case to the undersigned pursuant to 28 U.S.C. §
7 636(b)(1)(A) and (B). (Docket No. 24).

8 9 **II. BACKGROUND**

10 The procedural history may be summarized as follows:

11 On May 25, 2011, Plaintiff applied for DIB, alleging disability beginning May
12 29, 2010. (T at 203-207, 208-11).¹ The application was denied initially and Plaintiff
13 requested a hearing before an Administrative Law Judge ("ALJ"). On June 17,
14 2013, a hearing was held before ALJ Ilene Sloan. (T at 3). Plaintiff appeared with
15 her attorney and testified. (T at 9-19). The ALJ also received testimony from
16 Frederick Cutler, a vocational expert (T at 22-29).

17 On June 23, 2013, ALJ Sloan issued a written decision denying the
18 application for benefits and finding that Plaintiff was not disabled within the

19 ¹ Citations to ("T") refer to the administrative record at Docket No. 14.

1 meaning of the Social Security Act. (T at 91-109). The ALJ's decision became the
2 Commissioner's final decision on August 27, 2013, when the Social Security
3 Appeals Council denied Plaintiff's request for review. (T at 110-13).

4 On October 28, 2013, Plaintiff, acting by and through her counsel, timely
5 commenced this action by filing a Complaint in the United States District Court for
6 the Eastern District of Washington. (Docket No. 8). The Commissioner interposed
7 an Answer on January 21, 2014. (Docket No. 13).

8 Plaintiff filed a motion for summary judgment on June 5, 2014. (Docket No.
9 22). The Commissioner moved for summary judgment on August 15, 2014. (Docket
10 No. 28). Plaintiff filed a reply brief on August 30, 2014. (Docket No. 29).

11 For the reasons set forth below, the Commissioner's motion is denied,
12 Plaintiff's motion is granted, and this case is remanded for calculation of benefits.

14 **III. DISCUSSION**

15 **A. Sequential Evaluation Process**

16 The Social Security Act ("the Act") defines disability as the "inability to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which has
19 lasted or can be expected to last for a continuous period of not less than twelve

1 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
2 plaintiff shall be determined to be under a disability only if any impairments are of
3 such severity that a plaintiff is not only unable to do previous work but cannot,
4 considering plaintiff’s age, education and work experiences, engage in any other
5 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
6 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
7 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
10 one determines if the person is engaged in substantial gainful activities. If so,
11 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
12 decision maker proceeds to step two, which determines whether plaintiff has a
13 medically severe impairment or combination of impairments. 20 C.F.R. §§
14 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

15 If plaintiff does not have a severe impairment or combination of impairments,
16 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
17 the third step, which compares plaintiff’s impairment with a number of listed
18 impairments acknowledged by the Commissioner to be so severe as to preclude
19 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20

1 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
2 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
3 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
4 step, which determines whether the impairment prevents plaintiff from performing
5 work which was performed in the past. If a plaintiff is able to perform previous work
6 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
7 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
8 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
9 the process determines whether plaintiff is able to perform other work in the national
10 economy in view of plaintiff's residual functional capacity, age, education and past
11 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
12 *Yuckert*, 482 U.S. 137 (1987).

13 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
14 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
15 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
16 met once plaintiff establishes that a mental or physical impairment prevents the
17 performance of previous work. The burden then shifts, at step five, to the
18 Commissioner to show that (1) plaintiff can perform other substantial gainful
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1 activity and (2) a “significant number of jobs exist in the national economy” that
2 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

3 **B. Standard of Review**

4 Congress has provided a limited scope of judicial review of a Commissioner’s
5 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
6 made through an ALJ, when the determination is not based on legal error and is
7 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
8 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). “The [Commissioner’s]
9 determination that a plaintiff is not disabled will be upheld if the findings of fact are
10 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
11 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a
13 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
14 Substantial evidence “means such evidence as a reasonable mind might accept as
15 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
16 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]
17 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,
18 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a
19 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*

1 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
2 526 (9th Cir. 1980)).

3 It is the role of the Commissioner, not this Court, to resolve conflicts in
4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
5 interpretation, the Court may not substitute its judgment for that of the
6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
7 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
8 set aside if the proper legal standards were not applied in weighing the evidence and
9 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
10 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
11 administrative findings, or if there is conflicting evidence that will support a finding
12 of either disability or nondisability, the finding of the Commissioner is conclusive.
13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

14 **C. Commissioner's Decision**

15 ALJ Sloan noted that Plaintiff filed a prior application for benefits on January
16 9, 2007. (T at 94). That application was denied after hearing by an ALJ in a
17 decision dated May 28, 2010. The Appeals Council denied review and the matter
18 was (at the time of ALJ's Sloan's decision) pending review in federal district court.
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1 (T at 94).² For the sake of clarity, the following references to the “ALJ” refer to
2 ALJ Sloan and her June 23, 2013 decision.

3 The ALJ found that Plaintiff had not engaged in substantial gainful activity
4 since May 29, 2010, the alleged onset date, and met the insured status requirements
5 of the Social Security Act through December 31, 2011 (the “date last insured”). (T at
6 97). The ALJ determined that Plaintiff’s anxiety disorder and major depressive
7 disorder were “severe” impairments under the Act. (Tr. 97).

8 However, the ALJ concluded that Plaintiff did not have an impairment or
9 combination of impairments that met or medically equaled one of the impairments
10 set forth in the Listings. (T at 97-99). The ALJ determined that, as of the date last
11 insured, Plaintiff retained the residual functional capacity (“RFC”) to perform a full
12 range of work at all exertional levels, but would be limited to understanding,
13 remember, and carrying out simple, repetitive tasks and could have only superficial
14 contact with co-workers and no contact with the general public. (T at 99-103).

15 The ALJ concluded that Plaintiff could not perform her past relevant work as
16 an administrative clerk, invoice control clerk, truck driver sales route, or
17 promotional representative - sales. (T at 103). Considering Plaintiff’s age (48 on the

18 ² On July 23, 2013, the Honorable Cynthia Imbrogno, United States Magistrate Judge, issued an
19 Order remanding Plaintiff’s prior application for further proceedings. (Docket No. 28, in case
20 number 12-CV-03008).

1 date last insured), education (high school), work experience, and RFC (no exertional
2 limitations, with non-exertional limitations outlined above), the ALJ concluded that,
3 as of the date last insured, there were jobs that exist in significant numbers in the
4 national economy that Plaintiff can perform. (T at 103-104).

5 As such, the ALJ concluded that Plaintiff was not disabled, as defined under
6 the Act, between May 29, 2010 (the alleged onset date) and December 31, 2011 (the
7 date last insured) and was therefore not entitled to benefits. (Tr. 105). As noted
8 above, the ALJ's decision became the Commissioner's final decision when the
9 Appeals Council denied Plaintiff's request for review. (Tr. 110-13).

10 **D. Plaintiff's Arguments**

11 Plaintiff contends that the Commissioner's decision should be reversed. First,
12 she argues that the ALJ did not properly assess the medical opinions. Second,
13 Plaintiff challenges the ALJ's credibility determination. Third, Plaintiff contends
14 that she was deprived of due process. Fourth, she asserts that the ALJ's step five
15 analysis was flawed. This Court will examine each argument in turn.

IV. ANALYSIS

A. Medical Opinion Evidence

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only for clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

Dr. Sandra Saffran, a mental health professional, had a lengthy treating relationship with Plaintiff. (T at 317). In April of 2010, Dr. Saffran prepared a letter outlining her assessment of Plaintiff's mental health condition and limitations. She noted a diagnosis of post-traumatic stress disorder ("PTSD") and reported that Plaintiff's course of care had been "sporadic and riddled with imposed obstacles." (T at 317). In particular, Plaintiff cancelled appointments at the last minute, prevaricated, and manipulated her medication regime. (T at 317). Plaintiff often needed a family member to accompany her to therapy sessions. (T at 317).

1 Dr. Saffran explained that Plaintiff's PTSD arose from several traumatic
2 events in her life, including a sexual assault, workplace sexual harassment, and a
3 sibling's attempted suicide. (T at 317). Plaintiff experienced symptoms of hyper-
4 arousal or heightened anxiety, flashbacks, nightmares, hypervigilance, mood swings,
5 irrational/excessive anger, and intrusive memories. (T at 318). These symptoms
6 caused difficulties in social functioning, paranoia, and fear of leaving the home. (T
7 at 318). Eventually, her symptoms increased to the point at which she was
8 completely isolated and withdrawn from society. (T at 319).

9 According to Dr. Saffran, Plaintiff now experiences sleep problems, an
10 exaggerated startle response, and an inability to sit still for any length of time. (T at
11 319). She is unable to care for herself and requires the assistance of her mother to
12 attend to activities of daily living. (T at 319). She is unable to drive, does not leave
13 the house, and does not attend to personal care needs. (T at 319). Dr. Saffran opined
14 that Plaintiff was unable to function appropriately in the workplace. (T at 320).

15 At the same time, Dr. Saffran completed a medical source statement of ability
16 to do work-related activities (mental) form. She opined that Plaintiff had extreme
17 limitations with respect to (1) understanding, remembering, and carrying out
18 instructions and (2) interacting appropriately with supervisors, co-workers, and the
19 public, and responding to changes in a routine work setting. (T at 324-25).

1 In July of 2012, Dr. Saffran completed another mental medical source
2 statement. She assessed moderate limitations with regard to understanding and
3 memory and sustained concentration and persistence. (T at 330-31). She found
4 marked limitations as to social interaction and adaption skills. (T at 331-32).

5 The ALJ gave “little weight” to Dr. Saffran’s assessments. (T at 102). This
6 Court has no hesitancy in finding that the ALJ’s consideration of Dr. Saffran’s
7 assessments was flawed, not consistent with applicable law, and not supported by
8 substantial evidence.

9 The ALJ found that Dr. Saffran was not a “treating source” because, although
10 she holds a PhD and practices as a mental health professional, Dr. Saffran is
11 (apparently) not a licensed or certified psychologist in the State of Washington. (T at
12 102). The ALJ then proceeded to refer to Dr. Saffran as “Ms. Saffran” through the
13 balance of the decision. (T at 102).

14 The Social Security Regulation divide medical sources into two categories:
15 “acceptable” and “not acceptable.” 20 C.F.R. § 404.1502. Acceptable medical
16 sources include “[l]icensed or certified psychologists.” 20 C.F.R. § 404.1513 (2).
17 Medical sources classified as “not acceptable” include, but are not limited to, nurse
18 practitioners, therapists, licensed clinical social workers, and chiropractors. 20
19 C.F.R. § 404.1513 (d).

1 It does appear that, in fact, Dr. Saffran is not a licensed or certified
 2 psychologist in the State of Washington. Rather, she practices as a psychiatric nurse
 3 practitioner. (T at 102).³ As such, this Court finds no error in the ALJ's conclusion
 4 that Dr. Saffron was not an "acceptable" medical source. *See Mashtare v. Astrue*,
 5 No. CV-09-0346, 2011 U.S. Dist. LEXIS, at *13 n.2 (E.D.Wa. Jan. 4, 2011).

6 However, "other source" opinions cannot be ignored and must be evaluated on
 7 the basis of the source's qualifications, whether their opinions are consistent with the
 8 record evidence, the evidence provided in support of their opinions, and whether the
 9 other source is "has a specialty or area of expertise related to the individual's
 10 impairment." *See SSR 06-03p*, 20 CFR §§404.1513 (d), 416.913 (d). The ALJ must
 11 give "germane reasons" before discounting an "other source" opinion. *Dodrill v.*
 12 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

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 14 ³ Plaintiff notes that the ALJ obtained the information concerning the status of Dr. Saffran's
 15 licensing from evidence outside of the administrative record, in particular, from testimony she
 16 provided during the hearing on Plaintiff's prior application for benefits. (T at 102). However,
 17 there appears to be no material dispute on this point. As the Commissioner notes, the accuracy of
 18 the ALJ's information concerning Dr. Saffran's credentials is verified by the Washington State
 19 Department of Health's website (which provides a "provider credential search"). The ALJ could
 20 have taken judicial notice of the Department of Health's records. *See generally Kottle v. Nw.*
Kidney Ctrs, 146 F.3d 1056, 1064 n.7 (9th Cir. 1998). A remand simply to allow the ALJ to take
 such notice would serve no purpose. *See Hubbard v. Comm'r of Soc. Sec.*, 348 Fed. Appx. 551,
 553 n. 1 (11th Cir. 2009)("There would be little value in remanding this case just so that the ALJ
 may place the specific provisions of the DOT into the record. Therefore, we take judicial notice of
 the fact that Hubbard's past relevant work is classified as light in exertion according to the DOT.").

1 Here, Dr. Saffran has a specialty in the area of mental health, which certainly
2 relates to the area of impairment. She had a lengthy treating relationship with
3 Plaintiff (over four years). (T at 317). A review of the reasons cited by the ALJ for
4 discounting Dr. Saffran's assessment demonstrates that they are, individually and
5 collectively, not "germane" and therefore not sufficient to satisfy the applicable legal
6 standard.

7 First, the ALJ incorrectly concluded that Dr. Saffron's "opinions include[d]
8 very little explanation or citation to objective medical evidence in support of her
9 conclusions," which (the ALJ found) "significantly undermine[d] the value of her
10 statements." (T at 102). A cursory review of the record shows that the ALJ's
11 conclusion is not sustainable. Dr. Saffron's April 2010 letter provides four (4) pages
12 of single-spaced text explaining her detailed assessment of Plaintiff's mental health
13 impairment. (T at 317-20). In addition, Dr. Saffron's July 2012 medical
14 questionnaire contains detailed comments explaining her assessment. (T at 332).
15 These assessments are based on Dr. Saffron's mental health experience and clinical
16 observations of Plaintiff over a period that lasted several years. The assessments are
17 consistent with Dr. Saffron's contemporaneous treatment notes. (T at 303, 305, 306).
18 It is not clear what sort of additional "objective medical evidence" the ALJ believed
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1 was necessary to support an assessment provided by a medical source with that
2 treating relationship and those qualifications.

3 Second, the ALJ improperly discounted Dr. Saffron's April 2010 assessments
4 because they were generated prior to May 29, 2010, the start of the relevant period.⁴
5 (T at 102). Although evidence that pre-dates the relevant time period *may* be of
6 limited relevance, *see Carmickle v. Comm'r of Soc. Sec.*, 533 F.3d. 1155, 1165 (9th
7 Cir. 2008), it cannot be automatically or casually disregarded on this basis. *See*
8 *Manteau v. Colvin*, No. CV 12-1153, 2013 U.S. Dist. LEXIS 49266, at *9-*11
9 (C.D.Ca. Apr. 4, 2013). Here, the April 2010 assessments were rendered barely a
10 month before the beginning of the relevant time period. Those assessments make it
11 clear that Dr. Saffran, a mental health professional with a lengthy treating
12 relationship with Plaintiff, believed Plaintiff's mental health issues were pervasive,
13 long-standing, and unlikely to improve with treatment. (T at 317-20).

14 In addition, the ALJ apparently believed she was barred from considering the
15 April 2010 assessments because they had been "discredited" by the ALJ considering
16 Plaintiff's prior application for benefits. (T at 102). In so doing, the ALJ failed to
17 consider Dr. Saffran's April 2010 assessments in light of the evidence developed

18 ⁴ Plaintiff's prior application for benefits was denied in an ALJ decision rendered on May 28,
19 2010. Thus, the issue for this ALJ was whether Plaintiff was disabled on or after May 29, 2010.

1 after the first ALJ's decision, which (as discussed below) provided additional
2 support for Dr. Saffran's conclusions.

3 To make matters worse, the ALJ then explained that she was discounting Dr.
4 Saffran's July 2012 assessment because that opinion was rendered after December
5 31, 2011 (the date last insured). (T at 102-103). The ALJ found "no indication [Dr.]
6 Saffran felt [Plaintiff] was experiencing this level of limitation prior to December
7 31, 2011, or during the relevant time period." (T at 103). This conclusion ignores
8 both the April 2010 assessments and reads the July 2012 incorrectly. As discussed
9 above, the April 2010 assessments establish without doubt Dr. Saffran's view that
10 Plaintiff was "experiencing this level of limitation" prior to the date last insured. It
11 was likewise quite clear that Dr. Saffran's July 2012 report is describing the same
12 condition, which obviously existed prior to the date last insured. In particular, Dr.
13 Saffran explained that Plaintiff "*continues* to re-experience symptoms associated
14 with PTSD," and then described essentially the same symptoms she identified in her
15 April 2010 assessments. (T at 332)(emphasis added).

16 It is well-settled that medical reports "containing observations made after the
17 period for disability are relevant to assess the claimant's disability." *Smith v. Bowen*,
18 849 F.2d 1222, 1225 (9th Cir. 1988) (citing *Kemp v. Weinberger*, 522 F.2d 967, 969
19 (9th Cir. 1975)); *see also Lingenfelter v. Astrue*, 504 F.3d 1028, 1034 n.3 (9th Cir.

1 2007) (noting that “reports containing observations made after the period for
2 disability are relevant to assess the claimant’s disability”). Here, the July 2012
3 assessment clearly related to the relevant time period and should not have been
4 discounted.

5 Third, the ALJ improperly discounted the significance of Plaintiff’s symptoms
6 based on the fact that she received “minimal treatment” for her mental health
7 conditions. (T at 100). In particular, the ALJ believed that “[g]iven the alleged
8 severity of [Plaintiff’s] symptoms, it is reasonable to expect she would have sought
9 out additional treatment.” (T at 100). Under the circumstances, the ALJ’s
10 expectation was, in fact, quite *unreasonable*.

11 An ALJ must not draw an adverse inference from a claimant's failure to seek
12 treatment “without first considering any explanations that the individual may
13 provide, or other information in the case record, that may explain infrequent or
14 irregular medical visits or failure to seek medical treatment.” SSR 96-7p; *see also*
15 *Dean v. Astrue*, No. CV-08-3042, 2009 U.S. Dist. LEXIS 62789, at *14-15 (E.D.
16 Wash. July 22, 2009)(noting that “the SSR regulations direct the ALJ to question a
17 claimant at the administrative hearing to determine whether there are good reasons
18 for not pursuing medical treatment in a consistent manner”).

1 An ALJ's duty to develop the record in this regard is significant because there
2 are valid reasons why a claimant might not seek treatment. For example, "financial
3 concerns [might] prevent the claimant from seeking treatment [or] . . . the claimant
4 [may] structure[] his daily activities so as to minimize symptoms to a tolerable level
5 or eliminate them entirely." *Id.*

6 Here, the record contained probative evidence establishing valid reasons why
7 Plaintiff did not seek treatment at the level that might expected given the severity of
8 her symptoms. Dr. Saffran explained that Plaintiff was "emotionally crippled,"
9 incapable of driving, and afraid to leave home, which interfered with both her ability
10 to seek treatment and comply with treatment recommendations. (T at 317). Dr.
11 Saffran believed that Plaintiff lacked "the ego strength necessary to resolve the
12 multiple stressors associated with her traumatic events." (T at 320, 332). She also
13 noted Plaintiff's "financial limitations," which made it "difficult for her to receive
14 optimal treatment for her condition." (T at 332). The ALJ erred in failing to give
15 appropriate consideration to these factors, which provided context for Plaintiff's
16 failure to seek consistent mental health treatment.

17 Fourth, the ALJ did not give sufficient consideration to the correspondence
18 between Dr. Saffran's assessments and the opinion rendered by Dr. Jesse
19 McClelland, a psychiatric consultative examiner. In an October 2011 report, Dr.

1 McClelland diagnosed attention deficit hyperactivity disorder (combined type),
2 PTSD, major depressive disorder (severe, recurrent), and alcohol abuse (in
3 sustained, full remission). (T at 290). He assigned a Global Assessment of
4 Functioning (“GAF”) score⁵ of 32 (T at 290), which “indicates some impairment in
5 reality testing or communication (e.g., speech is at times illogical, obscure, or
6 irrelevant) or major impairment in several areas such as work or school, family
7 relations, judgment, thinking or mood.” *Tagin v. Astrue*, No. 11-cv-05120, 2011
8 U.S. Dist. LEXIS 136237 at *8 n.1 (W.D.Wa. Nov. 28, 2011)(citations omitted).

9 Although Dr. McClelland believed Plaintiff could perform some simple and
10 repetitive tasks, he believed she would struggle with maintaining regular attendance
11 in the workplace due to agoraphobia. (T at 290-91). He also expected interruptions
12 in a normal workday due to anxiety or depression. (T at 291). Dr. McClelland
13 questioned Plaintiff’s ability to deal with work stress as “she lacks mature coping
14 skills and does not deal well with stress or change.” (T at 291).

15 The ALJ discounted Dr. McClelland’s opinion, believing that the examiner
16 did not review any of Plaintiff’s medical records. (T at 101). It is true that, on the
17 section of his report labeled “Review of Records,” Dr. McClelland indicated “none.”

18 ⁵ “A GAF score is a rough estimate of an individual's psychological, social, and occupational
19 functioning used to reflect the individual's need for treatment.” *Vargas v. Lambert*, 159 F.3d 1161,
1164 n.2 (9th Cir. 1998).

1 (T at 286). However, there is good reason to believe this was a clerical error. Later
2 in the report, Dr. McClelland describes Plaintiff's remote memory skills regarding
3 her medical history as "correlating with medical records provided." (T at 289). This
4 suggests that Dr. McClelland did review medical records, but there is no indication
5 that the ALJ contacted Dr. McClelland to clarify this point. Moreover, even
6 assuming *arguendo* that Dr. McClelland did not review any records, there would be
7 good reason to believe he would have rendered an even *more* restrictive assessment
8 had he reviewed, for example, Dr. Saffran's April 2010 reports.

9 The ALJ also curiously faults Dr. McClelland for relying on Plaintiff's
10 "subjective statements" to establish her panic attacks and difficulties leaving home.
11 (T at 102). However, the consultative examiner is obviously not required to
12 *personally witness* a symptom to make an assessment of a claimant's condition (or
13 to conclude that a claimant likely suffers from the symptom). Indeed, unless the
14 examiner travelled to Plaintiff's home, it would be impossible for him to "observe"
15 her difficulty in leaving that setting.

16 Here, Plaintiff's difficulties are well-documented in reports and records from
17 her treating mental health provider. (T at 303, 305, 306, 317-20, 331-32). Dr.
18 McClelland also had the opportunity to speak with Plaintiff and assess the credibility
19 of her complaints. Indeed, "a patient's complaints or reports of [her] complaints, or
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1 history, is an essential diagnostic tool.” *Williams v. Colvin*, 13-03005, 2014 U.S.
2 Dist. LEXIS 6244, at *33 (E.D.Wa. Jan. 15, 2004). This was not a proper basis for
3 discounting the consultative examiner’s assessment.

4 Accordingly, this Court has no hesitancy in finding reversible error in the
5 ALJ’s assessment of the opinions provided by Dr. Saffran, a mental health provider
6 with a lengthy treating relationship, particularly given the correspondence between
7 her assessment, the treatment notes, and the opinion of Dr. McClelland, the
8 consultative examiner. The ALJ also improperly faulted Plaintiff for failing to seek
9 mental health treatment and ignored evidence explaining Plaintiff’s difficulties with
10 seeking such treatment. The ALJ also adopted an unduly formalistic view of the
11 evidence, discounting assessments from immediately prior to and shortly after the
12 relevant time period, even though the evidence had obvious relevance to the period
13 at issue. The ALJ’s decision cannot be sustained.

14 **B. Credibility**

15 A claimant’s subjective complaints concerning his or her limitations are an
16 important part of a disability claim. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
17 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ’s findings with regard to the
18 claimant’s credibility must be supported by specific cogent reasons. *Rashad v.*
19 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of

1 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
2 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
3 findings are insufficient: rather the ALJ must identify what testimony is not credible
4 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
5 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

6 In this case, Plaintiff testified as follows:

7 She lives with her mother, who attends to household bills. (T at 10). She has a
8 hard time sitting and "getting from A to B." (T at 13). A family member transports
9 her to appointments with Dr. Saffran, but she has trouble attending all of the
10 appointments because of anxiety. (T at 13). She takes a prescription medication
11 (Celexa) for anxiety, which seems to help. (T at 13-14). She has good days and bad.
12 (T at 15). Most days she watches television, visits with family, and performs some
13 gardening. (T at 15). She has friends, but had difficulty describing their activities
14 together. (T at 16-17). She does not shop, reads occasionally, and sometimes
15 prepares simple foods. (T at 18). Plaintiff apparently had a panic attack during her
16 testimony at the administrative hearing, indicated that she could not continue, and
17 left the room. (T at 20-22).

18 The ALJ found that Plaintiff's medically determinable impairments could
19 reasonably be expected to cause some of the alleged symptoms, but that her
20

1 statements concerning the intensity, persistence, and limiting effects of those
2 symptoms were not entirely credible. (T at 100).

3 This Court finds that the ALJ's credibility assessment cannot be sustained.
4 First, the ALJ placed undue emphasis on Plaintiff's activities of daily living. These
5 activities (occasional driving, attending church, performing light household chores,
6 socializing with family) have limited, if any, relevance with respect to Plaintiff's
7 ability to handle the stress demands of competitive, remunerative work.

8 The Ninth Circuit "has repeatedly asserted that the mere fact that a plaintiff
9 has carried on certain daily activities ... does not in any way detract from her
10 credibility as to her overall disability." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
11 2007) (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)). Moreover,
12 individuals with chronic mental health problems "commonly have their lives
13 structured to minimize stress and reduce their signs and symptoms." *Courneya v.*
14 *Colvin*, No. CV-12-5044, 2013 U.S. Dist. LEXIS 161332, at *13-14 (E.D.W.A.
15 Nov. 12, 2013)(quoting 20 C.F.R. Pt. 404, Subp't P, App. 1 § 12.00(D)).

16 "The Social Security Act does not require that claimants be utterly
17 incapacitated to be eligible for benefits, and many home activities are not easily
18 transferable to what may be the more grueling environment of the workplace, where
19 it might be impossible to periodically rest or take medication." *Fair v. Bowen*, 885

1 F.2d 597, 603 (9th Cir. 1989); *see also Bjornson v. Astrue*, 671 F.3d 640, 647 (7th
2 Cir. 2012)(“The critical differences between activities of daily living and activities
3 in a full-time job are that a person has more flexibility in scheduling the former than
4 the latter, can get help from other persons . . . , and is not held to a minimum standard
5 of performance, as she would be by an employer. The failure to recognize these
6 differences is a recurrent, and deplorable, feature of opinions by administrative law
7 judges in social security disability cases.”)(citations omitted).

8 Second, the ALJ improperly discounted Plaintiff’s credibility based on the
9 frequency of her mental health treatment. (T at 100). As outlined above, the ALJ
10 failed to consider evidence suggesting that Plaintiff’s failure to attend treatment was
11 the result of psychological and financial factors. (T at 317, 330, 332). Moreover, as
12 a general matter, “it is a questionable practice to chastise one with a mental
13 impairment for the exercise of poor judgment in seeking rehabilitation.” *Nguyen v.*
14 *Chater*, 100 F.3d 1462, 1465 (9th Cir.1996)(quoting *Blankenship v. Bowen*, 874
15 F.2d 1116, 1124 (6th Cir.1989)).

16 Third, the ALJ cited a series of “inconsistencies” in Plaintiff’s testimony that
17 were, in fact, manifestly minor in nature and readily explained. For example, the
18 ALJ noted Plaintiff’s testimony that she had difficulty leaving the house and found it
19 inconsistent with a report that Plaintiff took her daughter to the emergency room in

1 early 2012. (T at 101). However, Plaintiff did not testify that she was completely
2 unable to leave the house; in fact she discussed driving on occasion and being taken
3 by family members to sessions with Dr. Saffran. (T at 13). Thus, there was no
4 contradiction. Moreover, the fact that Plaintiff could summon the strength to leave
5 the house to obtain *emergency* medical care *after finding that her daughter had*
6 *attempted suicide* hardly undermines Plaintiff's testimony that she has difficulty
7 leaving the house. (T at 302). Indeed, Dr. Saffran reported that Plaintiff's trip to the
8 emergency room with her daughter brought on a "big anxiety attack" (T at 302), a
9 fact the ALJ failed to mention.

10 The ALJ also noted that, when questioned at the administrative hearing,
11 Plaintiff was unable to describe the activities she engages in with her friends. (T at
12 101). The ALJ might have considered, but did not, the fact that Plaintiff was
13 apparently in the midst of a panic attack during the administrative hearing, which
14 eventually forced her to leave the room. (T at 21-22).

15 The ALJ also found it significant that the record contained several references
16 to Plaintiff having "financial problems," which (the ALJ believed) "raise[d] the issue
17 of secondary gain." (T at 101). As an example, the ALJ cited evidence that Plaintiff
18 was at risk of losing her home and was concerned that she would not have sufficient
19 funds to hire an attorney. (T at 101). It is quite honestly hard to understand how the

1 ALJ could possibly have cited these factors as reasons for discounting Plaintiff's
2 credibility, especially in the absence of any indication of malingering from Dr.
3 Saffran and Dr. McClelland.

4 Plaintiff alleges that she suffers from debilitating mental health symptoms
5 (including difficulty even leaving her house), which render her unable to work. It
6 would be surprising indeed if Plaintiff did *not* have financial problems. Plaintiff is
7 seeking Social Security benefits to ameliorate the financial burdens caused by her
8 inability to work. This hardly makes her unique among claimants and, indeed, this
9 is the very purpose of having a system that provides such benefits in the first place.
10 *See Edgar v. Astrue*, No. 08-6379-AC, 2010 U.S. Dist. LEXIS 69226, 2010 WL
11 2730927, at *5 (D. Or. June 2, 2010) ("The ALJ may not chastise a claimant for
12 seeking disability benefits payments; such reasoning circumvents the very purpose
13 of disability benefit applications"); *Walker v. Colvin*, No. CV 12-2248, 2013 U.S.
14 Dist. LEXIS 46260, at *18-19 (C.D.Ca. Mar. 28, 2013)("[B]eing under 'financial
15 pressure' is not a legitimate reason for disbelieving plaintiff's subjective
16 allegations.").

17 Lastly, Plaintiff's allegations were supported by the opinions provided by Dr.
18 Saffran and Dr. McClelland, which the ALJ improperly discounted for the reasons
19 outlined above.

1 Accordingly, this Court finds the ALJ's credibility assessment flawed and not
2 supported by substantial evidence.

3 **C. Due Process**

4 Plaintiff alleges that the ALJ violated her due process rights via a biased
5 decision, by continuing the hearing after she exited due to a panic attack, and by
6 limiting her counsel's cross-examination of the vocational expert.

7 "ALJs are presumed to be unbiased." *Valentine v. Comm'r Social Sec. Admin.*,
8 574 F.3d 685, 690 (9th Cir. 2009) (quoting *Rollins v. Massanari*, 261 F.3d 853, 857
9 (9th Cir. 2001)). The presumption "can be rebutted by a showing of conflict of
10 interest or some other specific reason for disqualification. . . . But expressions of
11 impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of
12 what imperfect men and women sometimes display[,] do not establish bias."
13 *Valentine*, 574 F.3d at 690 (quoting *Rollins*, 261 F.3d at 857-58). To prevail on a
14 bias claim, the claimant must show that "the ALJ's behavior, in the context of the
15 whole case, was 'so extreme as to display clear inability to render fair judgment.'"
16 *Bayliss*, 427 F.3d at 1215.

17 Although the ALJ's decision was clearly erroneous (for the reasons outlined
18 above), Plaintiff had not established that her behavior was "so extreme" as to display
19 a "clear inability to render fair judgment." *Id.*, although for this Court, it is a close

1 call. The ALJ engaged in a lengthy (albeit deeply flawed) discussion of the evidence
2 and reached a conclusion that she presumably believed was supported by the
3 evidence and consistent with the law. While this may be simple (and rather obvious)
4 error and not bias, it may be a basis for requiring more training for this ALJ.

5 With regard to the conduct of the hearing, the ALJ initially granted Plaintiff a
6 brief recess to see whether her symptoms would subside. (T at 19). Once it became
7 clear that Plaintiff could/would not remain in the room (T at 21), the ALJ continued
8 the hearing without objection from Plaintiff's counsel, but also without any evident
9 consideration as to whether it was appropriate to continue the hearing in Plaintiff's
10 absence. (T at 21-22). The ALJ was also a bit intrusive in her oversight of counsel's
11 questioning of the vocational expert, demanding that he clarify well-known terms
12 (e.g. "simple") and inhibiting the flow of questioning. (T at 29-33). However,
13 Plaintiff has not articulated any particular prejudice arising either from the decision
14 to continue the hearing or from the interference with counsel's questioning.
15 Moreover, any arguable prejudice is moot at this point in light of the decision by this
16 Court to remand this matter for calculation of benefits.

17 **D. Step Five**

18 Plaintiff also challenges the ALJ's step five analysis. For the reasons outlined
19 above, this Court finds this aspect of the ALJ's evaluation, which was necessarily
20

1 informed by her assessment of the medical opinions and evaluation of Plaintiff's
2 credibility, flawed and unsupported by substantial evidence.

3 **E. Remand**

4 This Court has discretion to remand a case for additional evidence and
5 findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).
6 An award of benefits may be directed where the record has been fully developed and
7 where further administrative proceedings would serve no useful purpose. *Id.* Courts
8 have credited evidence and remanded for an award of benefits where (1) the ALJ has
9 failed to provide legally sufficient reasons for rejecting such evidence, (2) there are
10 no outstanding issues that must be resolved before a determination of disability can
11 be made, and (3) it is clear from the record that the ALJ would be required to find
12 the claimant disabled were such evidence credited. *Id.* In this case, as set forth
13 above, the ALJ's reasons for discounting the opinions of Dr. Saffran and Dr.
14 McClelland were legally insufficient. The ALJ's assessment of Plaintiff's credibility
15 was likewise flawed and not supported by substantial evidence. There are no
16 outstanding issues and the record is fully developed. It is clear beyond all doubt that
17 the ALJ would be required to find Plaintiff disabled if the evidence outlined above
18 was credited. Thus, a finding that Plaintiff is disabled is required. Therefore, the
19 ALJ's decision is reversed and this matter remanded for determination of benefits.

V. ORDERS

IT IS THEREFORE ORDERED that:

Plaintiff's motion for summary judgment, **Docket No. 22**, is **GRANTED**.

The Commissioner's motion for summary judgment, **Docket No. 28**, is **DENIED**.

This case is **REMANDED** to the Commissioner for calculation of benefits.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of the Plaintiff, and keep the case open for a period of sixty (60) days to allow Plaintiff's counsel an opportunity to submit an application for attorneys' fees.

DATED this 15th day of October, 2014.

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE